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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED FOOD & COMMERCIAL WORKERS LOCAL 99, et al., Plaintiffs, v. JAN BREWER, in her official capacity as Governor of the State of Arizona, et al., Defendants.	Case No: 2:11-cv-921-PHX-GMS **STATE DEFENDANTS' MOTION TO DISMISS INTERVENORS' COMPLAINT** (Oral Argument Requested)

The Intervenors' Complaint duplicates many of the allegations in the Plaintiffs' Complaint and suffers from the same jurisdictional defects. Pursuant to Fed. R. Civ. P. 12(b)(1) & (6), Defendants Tom Horne and Ken Bennett hereby move to dismiss the Intervenors Complaint for Injunctive and Declaratory Relief (doc. 52).

I. FACTUAL BACKGROUND

A. SB 1365

The Arizona Legislature enacted SB 1365, which added a new statute, A.R.S. § 23-361.02. Subsection A of the statute provides that, "A public or private employer in this state shall not deduct any payment from an employee's paycheck for political purposes unless the employee annually provides written or electronic authorization to the employer for the deduction." Subsection B provides that if a deduction is made from an

employee's paycheck for multiple purposes, the entity to which the deductions are paid must provide a "statement indicating that the payment is not used for political purposes or a statement that indicates the maximum percentage that is used for political purposes." These provisions go into effect on October 1, 2011.

Subsection C of the new statute directs the Attorney General to adopt rules for "the acceptable forms of employee authorization and entity statements." Pursuant to Subsection D, an employer who knowingly deducts payments without an employee's authorization or an entity that provides an inaccurate statement is subject to a civil penalty of at least $10,000. The Attorney General is responsible for imposing and collecting the civil penalties.

B. SB 1363

The Legislature also adopted SB 1363, which amended several existing laws and added others. The measure provides:

§ 1 – Amends A.R.S. § 12-1809, which authorizes state courts to issue an injunction against harassment, by expanding the definition of "harassment" in Subsection (R) to include unlawful picketing and other activities defined in the amended A.R.S. § 23-1321 and defamation as defined in the newly adopted A.R.S. § 23-1325.

§ 2 – Amends A.R.S. § 12-1810, which authorizes state courts to issue an injunction against workplace harassment, by expanding the definition of "harassment" in Subsection (R)(2) to include unlawful picketing and other activities defined in the amended A.R.S. § 23-1321 and defamation as defined in the newly adopted A.R.S. § 23-1325.

§ 3 – Amends A.R.S. § 23-352(2) to prohibit an employer from withholding an employee's wages past the date specified by the employee in a written revocation of authorization.

§ 4 – Amends A.R.S. § 23-1321 to provide definitions of "concerted interference with lawful exercise of business activity," "trespassory assembly," "unlawful mass assembly," and "unlawful picketing."

§ 5 – Amends A.R.S. § 23-1322 by expanding the definition of "unlawful picketing" to include picketing by a labor organization to coerce or induce an employer or self-employed person to join or contribute to a labor organization.

§ 6 – Amends A.R.S. § 23-1323 by expanding the remedies to persons injured by unlawful picketing, trespassory assembly, unlawful mass assembly, and concerted interference with lawful exercise of business activity.

§ 7 – Amends A.R.S. § 23-1324 to classify unlawful picketing, unlawful mass assembly, trespassory assembly, and secondary boycotting as a Class 1 or Class 2 misdemeanor punishable by a fine of not less than $200.

§ 8 – Adds A.R.S. § 23-1325, which establishes a statutory cause of action for defamation of an employer; adds A.R.S. § 23-1326, which directs the Secretary of State to establish a "no trespass notice list" identifying employers with established property rights and which creates a procedure for employers to be included on the list; adds A.R.S. § 23-1327, which prohibits "unlawful mass assembly" as defined in the statute, but does not prohibit assembly that is authorized under the Arizona or U.S. Constitution or federal law; adds A.R.S. § 23-1328, which prohibits trespassory assembly; and adds A.R.S. § 23-1329, which prohibits a person from publicizing the picketing or assembly at a specific location, if a court with jurisdiction over the location has issued an injunction against the continuation of the picketing or assembly at that location.

C. The Intervenors' Complaint

Intervenor Arizona Education Association (AEA) is a professional organization and union with over 28,000 members in Arizona. (Doc. 52, ¶ 6.) It is an affiliate of the National Education Association. (*Id.*) Intervenors Melissa England, Kerry-Lynn Scheffler, and Danielle Nowak are members of the AEA. (*Id.*, ¶¶ 7-9.)

Intervenor American Federation of State, County and Municipal Employees is a labor union that represents public service workers. (*Id.*, ¶¶ 10-15.) Local 449, Local 2384, Local 2960, Local 3111, and Local 3282 of AFSCME have approximately 3,500 members in Pima and Maricopa Counties. (*Id.*)

Intervenor Service Employees International Union, Local 5 (SEIU Arizona) is a labor union that represents both public service employees and private employees in Arizona. (*Id.*, ¶ 16.)

Intervenor Arizona Federal of Teachers Union (AFTU) is a labor union operating in Arizona. (*Id.*, ¶ 18.) It is affiliated with the American Federation of Teachers. (*Id.*)

The Intervenors bring this action under 42 U.S.C. § 1983. They allege that SB 1365 violates the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the contract clause of the United States Constitution. They further allege that SB 1365 is vague and overbroad, imposes an unconstitutional condition on them, and is preempted by the Federal Election Campaign Act (FECA). Additionally, Intervenor SEIU Arizona alleges that SB 1363 violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment; and that it is unconstitutionally vague, overbroad, and preempted by the National Labor Relations Act (NLRA) and Labor Management Relations Act (LMRA).

The Intervenors name Attorney General Tom Horne, Secretary of State Ken Bennett, and Maricopa County Sheriff Joe Arpaio as Defendants. (Doc. 52, ¶¶ 19-21.) They are sued in their official capacities. The two State officials, Horne and Bennett, may sometimes be referred to jointly as the "State Defendants" or simply "the State."

II. LEGAL DISCUSSION

A. Legal Standards

The question whether subject matter jurisdiction exists is one of law. *Kingman Reef Atoll Investments, LLC v. United States*, 541 F.3d 1189 (9th Cir. 2008). In a Rule 12(b)(1) motion, "the district court is not confined by the facts contained in the four corners of the complaint—it may consider facts and need not assume the truthfulness of the complaint." *Americopters, LLC v. FAA*, 441 F.3d 726, 732 n. 4 (9th Cir. 2006). On a motion to dismiss, the court is not required to assume the truth of legal conclusions. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

The Plaintiffs have the burden of establishing that this Court has jurisdiction. *Kokkonen v. Guardian of Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). At the pleading stage, they may satisfy this burden by alleging facts that, if proven, establish the court's jurisdiction. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

B. The Intervenors' Complaint Fails to Present a Case or Controversy.

1. The Intervenors lack standing.

Under Article III of the United States Constitution, a party must demonstrate standing in order to satisfy the "case or controversy" requirement necessary for a federal court to exercise its judicial power. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Lujan*, the Supreme Court identified three elements necessary to establish Article III standing: (1) an injury-in-fact to a legally protected interest that is concrete and particularized or actual or imminent; (2) a causal connection between their injury and the conduct complained of; and (3) that it is likely, not merely speculative, that their injury will be redressed by a favorable decision. *Id*. at 560-61; *Western Min. Council v. Watt*, 643 F.2d 618, 623 (9th Cir. 1981) (observing that standing requires a plaintiff to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues"). Moreover, in the context of injunctive relief, a plaintiff "must demonstrate a real or immediate threat of an irreparable injury." *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 (9th Cir. 2000). The Intervenors cannot meet these requirements.

a. No Injury-in-Fact

According to the Complaint, the Intervenor unions all have some members who pay their union dues via payroll deduction. (Doc. 52, ¶¶ 36-39.) The Intervenor unions have used, and will continue to use, member dues for political purposes. (*Id.*, ¶ 42.) Because of that, they acknowledge that compliance with SB 1365 will require them to provide a statement indicating the maximum percentage of dues used for political purposes. (*Id.*, ¶ 43.) The Intervenors say they do not know at this time how to

determine the maximum percentage used for political purposes and point out that the rules concerning entity statements have not yet been promulgated. (*Id.*, ¶¶ 43, 28.)

The Intervenors say they anticipate that some employers that currently permit dues deduction may stop doing so. (*Id.*, ¶ 44.) They allege that they have begun or plan to implement other methods of collecting dues payments, such as electronic fund transfers. (*Id.*, ¶¶ 46-47.) Some of the Intervenors predict they "will suffer the loss of future dues revenue." (*Id.*, ¶ 48.) SEIU Arizona says it is likely to stop using member dues for political purposes "because the costs of collecting dues in some fashion other than payroll deduction and the risk of criminal liability under SB 1365 are too great." (*Id.*, ¶ 50.)

As for SB 1363, the Intervenor SEIU Arizona alleges that the prohibitions on interference with lawful exercise of business activity, trespassory assembly, unlawful mass assembly, and boycott-related activities will restrict and chill its First Amendment-protected activities. (*Id.*, ¶¶ 56-57, 60, 63, 68, 83.) It further alleges that the "easy availability of injunctive relief" and the criminal penalties for certain activities on employer properties listed on the "no trespass public notice list" will also chill its exercise of First Amendment rights. (*Id.*, ¶¶ 88, 93-94.)

As discussed below, none of these alleged injuries is "actual or imminent" and "concrete and particularized" enough to confer standing. *See Lujan*, 504 U.S. at 560. The Intervenors' "anticipation" that some employers might stop deducting dues is baseless. There is no allegation that any employer has stopped deducting the dues of the Intervenor unions. The allegation of some Intervenors that they may lose dues revenue in the future is also baseless speculation. The Intervenors allege that all members who pay their union dues via payroll deductions do so voluntarily. (Doc. 52, ¶¶ 23, 40.) If that is true, SB 1365 will make have no effect on dues those voluntary dues-paying members may be counted on to authorize their employers to include the percentage of dues used for political purposes in the overall dues deducted.

Intervenor SEIU Arizona alleges that the wage-deduction provisions of SB 1363 and SB 1365 will impair its ability to predict its income over the year. (*Id.*, ¶ 98.) In the Fourteenth Claim for Relief, SEIU Arizona alleges that these provisions, as well as the provision dealing with the creation of a "no trespass public notice list," are preempted by the NLRA. (*Id.*, ¶¶ 177-181.) But SEIU Arizona has not alleged that it is covered by the NLRA, and therefore it cannot argue NLRA preemption or claim any injury resulting from preemption.

b. Causation & Redressability

The speculative nature of the injuries alleged by the Intervenors is not the only problem. There is also a gap between the alleged injuries and the relief sought. For that reason, many of the alleged injuries are not likely to be redressed.

The Intervenors say they are not sure how to determine the maximum percentage of dues used for political purposes and that the Attorney General is charged with promulgating forms required for compliance with the law. (Doc. 52, ¶¶ 28-29.) But rather than wait for the rules, which may provide the guidance they say they need, they seek an injunction that would block the implementation of the law, among other things.

The Intervenors allege repeatedly that the provisions of SB 1363 and SB 1365 will chill their exercise of First Amendment activities. But most of the provisions they complain about in these two enactments are not enforced by the State Defendants, and therefore the injunction they seek will not redress their alleged injury. For example, the Intervenors say they might be subjected to state court injunctions pursuant to sections 1, 2, and 8 of SB 1363. But those provisions, which deal with injunctions against harassment and defamation, are carried out through private enforcement actions. *See* A.R.S. § 12-1809 (authorizing any "person" to apply for an injunction against harassment); A.R.S. § 12-1810 (authorizing any "employer" to apply for an injunction against workplace harassment); A.R.S. § 23-1325 (authorizing "any employer against whom defamation is directed" to seek an injunction). An injunction against the State

Defendants would not affect whether the Intervenors are enjoined pursuant to one of these amended or new statutes.

The Secretary of State is implicated in only one provision of SB 1363. As previously noted, a subpart of § 8 adds A.R.S. § 23-1326, which directs the Secretary of State to establish a "no trespass public notice list." Even assuming an injunction against the Secretary of State was appropriate, it would only restrain him from establishing the list, and it would not redress the Intervenors' alleged injuries.

2. The Intervenors' Complaint is not ripe for adjudication.

a. Constitutional Ripeness

To satisfy the Article III "case or controversy" requirement, the Intervenors must also establish that their claims are ripe for adjudication. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). "The ripeness inquiry is often treated under the rubric of standing and, in many cases, coincides with standing's injury in fact prong." *Id.* at 1138-39. The "'basic rationale' . . . is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2009) (citation omitted). The Intervenors present no claim that is ripe for judicial review because they do not allege an actual injury or a realistic danger of imminent injury.

"Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (citations omitted). "Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the "case or controversy" requirement. *Thomas*, 220 F.3d at 1139 (citation omitted). The constitutional component of ripeness requires that a plaintiff demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298

(1979)). For purposes of a pre-enforcement challenge, the constitutional ripeness inquiry focuses on: (1) whether the plaintiffs have articulated a concrete plan to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. *Thomas*, 220 F.3d at 1139 (citation omitted). The Intervenors fail to satisfy any of these requirements.

In *San Diego County County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), several groups and individuals brought a pre-enforcement challenge to a gun-control law and alleged that they intended to engage in activities prohibited by the law. The Ninth Circuit held that they presented no credible threat of enforcement so as to justify judicial review. *Id*. at 1127-28. Here, the Intervenors give no indication that they plan to violate any of the laws in question. Indeed, they seem intent on complying with the laws. They have not demonstrated a realistic danger of imminent injury.

The Intervenors' allegations that the challenged enactments, particularly SB 1363, will have a chilling effect on the First Amendment rights does not render their claims ripe. However, these measures regulate conduct more than they regulate speech. Moreover, even when the Intervenors challenge a speech restriction, they must still satisfy "the rigid constitutional requirement that [they] must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Lopez*, 630 F.3d at 785-86 (citations omitted). The Intervenors have not done so.

b. Prudential Ripeness

Ripeness also has a prudential component. *Id*. at 1131. The prudential considerations of ripeness are amplified where constitutional issues are concerned. *Scott*, 306 F.3d at 662 (citing *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947). In applying the prudential ripeness doctrine, the Court considers two factors: (1) the "fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Stormans*, 586 F.3d at 1126.

The first factor focuses on whether "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* A claim is unripe "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scott*, 306 F.3d at 662 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). In conducting this analysis, the Court should look primarily to the factual situation presented for consideration. "A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate." *San Diego County*, 98 F.3d at 1132. In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 304 (1979), the Supreme Court held that a district court should not have exercised jurisdiction over a claim when it was "impossible to know" whether access provision in state agricultural labor law would be applied in the manner the plaintiffs alleged. The Court refused to adjudicate the claim based only on a "hypothesi[s] that such an event will come to pass." *Id.*

The reluctance to decide important questions of law based on hypothetical situations springs from the principle that courts do not decide "constitutional questions in a vacuum." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). There, the Ninth Circuit found that a pre-enforcement challenge to Alaska's Code of Judicial Conduct that presented no "concrete factual situation" was not ripe. *Id.* Federal courts are appropriately cautious about "premature adjudication" of questions concerning the constitutionality of a "novel [s]tate Act." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997).

The Intervenors' Complaint on speculation and legal theories, but it rests entirely on conjecture rather than a concrete factual situation. The Intervenors take issue with provisions in the amended or new statutes that authorize state courts to issue injunctions against for certain activities. *See* SB 1363, §§ 1-2, 8. What specific conduct might lead to an injunction? Precisely what conduct is enjoined? Such information is critical to analyzing the constitutionality of a state court injunction, but it is missing here.

The Intervenors challenge the provision of SB 1363 that establishes a cause of action for defamation of an employer. But whatever issue this raises cannot be decided in the abstract. What is the allegedly defamatory statement? Is it provably false? In what context was it made? Who is the subject of the alleged defamatory statement? These questions are relevant to analyzing a defamation claim, and the resolution of any of them might obviate the need to decide a constitutional issue, if there is one. Moreover, a defamation claim could be brought in state court, where the judges are entirely capable of determining the necessary issues, including any constitutional issue.

The Intervenors challenge the provision of SB 1365 that in some situations requires an entity to provide the employer with a statement indicating the maximum percentage of a pay deduction used for political purposes. The Intervenors allege that they do not know what political purposes are, although they list some of their political activities. (Doc. 52, ¶ 42.) They have identified no concrete factual situation to frame a constitutional issue. *Cf. Lopez*, 630 F.3d at 787 (stating that allegations must be specific enough so that a court need not "speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication") (quoting *Mitchell*, 330 U.S. at 90).

The Intervenors' claims are based on speculation and conjecture. Withholding consideration until there is an actual, concrete dispute will impose no hardship. There may never even be such a dispute. Even if there is, any dispute regarding these state statutes could be heard in state court and the Intervenors or other unions could raise constitutional issues then and there.

Also, insofar as the Intervenors seek declaratory relief, the Declaratory Judgment Act provides that a federal court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The statute "confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995); *Public Svc. Comm'n v. Wykoff*, 344 U.S. 237, 241 (1952). Emphasizing the discretionary nature of the statute, the Supreme Court held in

Wilton that district courts may decline to exercise their discretion to entertain an action "even when the suit otherwise satisfies subject matter jurisdictional prerequisites." 515 U.S. at 282. "The normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.* at 288.

The Court's role "is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Stormans*, 586 F.3d at 1122. Because of its reliance on speculation about contingent events that may never occur, the Intervenors' Complaint fails to establish a real and immediate threat to them or anyone else, and their suit is unripe.

C. Even if the Intervenors Have Alleged a Justiciable Controversy, This Action is Partially Barred By the Eleventh Amendment.

Under the Eleventh Amendment, states are generally immune from suit in federal court, regardless of the relief sought. *Seminole Tribe of Fla. v. Florida*, 493 U.S. 44, 58 (1996). Plaintiffs have brought this action against two state officials—Attorney General Horne and Secretary of State Bennett—and one county official. A suit against a state official in his or her official capacity suit is no different from a suit against the State. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). *Ex parte Young*, 209 U.S. 123 (1908), provides a narrow exception to Eleventh Amendment immunity for certain suits seeking prospective relief for an ongoing constitutional violation.

Assuming for the sake of argument that the Intervenors have sufficiently alleged a justiciable controversy, this case can proceed against the two state officials only to the limited extent the claims and relief sought fit within the *Young* exception. The *Young* exception requires a "special relation" between the state officer and the challenged statute, such that the officer has some connection with the enforcement of the act. *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir. 1999) (citations omitted). The required connection "must be fairly direct; a

generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998).

Attorney General Horne "is responsible under SB 1365 for rulemaking and enforcing the penalty provision." (Doc. 52, ¶¶ 19, 28.) But there is no allegation that the Attorney General is responsible for enforcing SB 1363, and nothing in the enactment indicates that he is responsible in carrying it out. Because there is no "fairly direct connection" between the Attorney General and SB 1363, all claims against Attorney General Horne based on SB 1363 (Claims Eight through Fourteen) should be dismissed. *See Young v. State of Hawaii*, 548 F.Supp.2d 1151, 1164 (D. Hawaii 2008).

So far as appears in the complaint, the Secretary of State is given the responsibility by SB 1363 of compiling and distributing a "No Trespass Public Notice List" to law enforcement agencies. (Doc. 52, ¶¶ 20, 89.) There is no suggestion that he has any role in carrying out SB 1365. Consequently, the claims against the Secretary of State should be dismissed to the extent they are based on SB 1365. The claims based on SB 1363 should also be dismissed except to the extent that they seek prospective relief relating to the preparation of the no-trespass list.

III. CONCLUSION

For the foregoing reasons, the Complaint in Intervention for Injunctive and Declaratory Relief (doc. 52) should be dismissed.

Respectfully submitted this 22nd day of July, 2011.

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I certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following, if CM/ECF registrants, and mailed a copy of same to any non-registrants, this 22nd day of July, 2011, to:

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